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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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In the Matter of)
)
Policies and Rules for the)
Direct Broadcast Satellite Service)

FEDERAL COMMUNICATIONS COMMISSION
IB Docket No. 98-21 OFFICE OF THE SECRETARY

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To: The Commission

REPLY COMMENTS OF UNIVISION COMMUNICATIONS INC.

Univision Communications Inc. ("Univision"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby respectfully submits its Reply Comments in response to the Commission's Notice of Proposed Rulemaking in IB Docket No. 98-21 (the "NPRM"). As set forth in Univision's Comments in this proceeding, the Commission should adopt rules prohibiting major multi-channel video programming distribution ("MPVD") service providers, such as cable multiple system operators ("MSOs"), from gaining an ownership interest in direct-to-home ("DTH") satellite services, whether in the fixed satellite or direct broadcast satellite ("DBS") services.

1. Univision operates the Univision Network, the nation's most popular Spanish-language broadcast network, which has 41 television station affiliates, 20 of which are full-power television stations. Univision also owns and operates Galavision, the nation's most-watched Spanish-language cable network. As a cable network, Galavision relies upon cable systems and/or DTH services to provide its programming to Hispanic viewers nationwide, and the

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Univision Network relies on such carriage in areas where it has no broadcast affiliates. It is Univision's concern that it will be unable to provide its programming to these Hispanic viewers in the future if the Commission permits cable MSOs to acquire interests in DTH services.

2. Numerous comments in this proceeding detail the significant anticompetitive effects that would result from permitting an incumbent cable operator to gain an ownership interest in a DTH operator.^{1/} One such anticompetitive effect of particular concern to Univision is that independent program suppliers will face increased difficulty in reaching viewers if the power to provide electronic access to homes is concentrated in the hands of just a few gatekeepers.^{2/} In most situations, the incumbent cable operator and DTH operators are the only entities that can provide access to viewers that lack a television antenna or are located outside the coverage area of a program supplier's broadcast affiliates (if it has any). Permitting the already limited number of gatekeepers to merge will decrease the access of independent programmers to viewers. This is especially true in situations where the incumbent cable operator is a vertically-integrated cable MSO with ownership interests in a large number of program suppliers. Such entities have a financial incentive to carry their own programming and not the programming of independent programmers that compete with the MSO's program suppliers.

^{1/} See, e.g., Comments of DIRECTV, INC., IB Docket No. 98-21 (filed April 6, 1998) at 7-11; Comments of EchoStar Communications Corporation, IB Docket No. 98-21 (filed April 6, 1998) at 3-5; Comments of BellSouth Corporation, IB Docket No. 98-21 (filed April 6, 1998) at 2-5; Comments of the National Rural Telecommunications Cooperative, IB Docket No. 98-21 (filed April 6, 1998) at 3-7; Comments of Wireless Cable Association, Inc., IB Docket No. 98-21 (filed April 6, 1998); Comments of Ameritech, IB Docket No. 98-21 (filed April 6, 1998) at 11-15.

^{2/} See Comments of Univision Communications Inc., IB Docket No. 98-21 (filed April 6, 1998) at 3-8.

3. None of the commentators in this proceeding have adequately addressed this concern. Indeed, the commentators that contend that a cable/DBS cross-ownership ban is unwarranted primarily argue that because circumstances have not changed since the Commission last declined to adopt such a prohibition, the Commission has no reason to reconsider its past decision.^{3/} Not only does this argument not address the anticompetitive concerns voiced in this proceeding, but it lacks legal support. In the past, the Commission has dismissed arguments that it cannot alter its rules without a change in circumstances by stating that the Commission

does have the authority and, indeed, the obligation to reexamine its regulatory policies to ensure that they continue to serve the public interest. An agency is not prohibited from changing its mind. [F]aced with new developments or in light of reconsideration of the relevant facts and its mandate, [the agency] may alter its past interpretation and overturn past administrative rulings and practice.^{4/}

4. The real point of contention on this issue, as evidenced by the numerous parties that commented on it, is whether a cable/DBS cross-ownership prohibition should be codified as

^{3/} See, e.g., Comments of the National Cable Television Association, IB Docket No. 98-21 (filed April 6, 1998) at 5-7; Comments of News Corporation Limited, IB Docket No. 98-21 (filed April 6, 1998) at 2-5; Comments of Time Warner Cable, IB Docket No. 98-21 (filed April 6, 1998) at 2-7; Comments of PRIMESTAR, INC., IB Docket No. 98-21 (filed April 6, 1998) at 6-13. Alternatively, one commentator asserted that a cable/DBS cross-ownership ban would violate the First Amendment. Comments of Time Warner Cable, IB Docket No. 98-21 (filed April 6, 1998) at 7-9. Univision notes that this claim is erroneous, as the Commission's other similar cross-ownership rules have been upheld by the courts repeatedly. For example, in response to a First Amendment challenge to the Commission's newspaper-broadcast cross-ownership rule, the United States Supreme Court noted that "[t]he contention that the First Amendment rights of newspaper owners are violated by the regulations ignores the fundamental proposition that there is no 'unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'" FCC v. National Citizens Com. for Broadcasting, 436 U.S. 775, 776 (1978) (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969)).

^{4/} Computer III Remand Proceedings, 6 FCC Rcd 7571 (1991) at ¶ 88 (quoting Spartan Radiocasting Co. v. FCC, 619 F.2d 314, 322 (1980) (citing American Trucking Ass'n v. Atchison, Topeka and Santa Fe Railway Co., 387 U.S. 397, 416 (1967) (internal citations omitted) (subsequent history omitted)).

a rule or handled on a case-by-case basis. The substantial record before the Commission on this matter supports the adoption of a bright line cable/DBS cross-ownership rule.

5. The Commission has long recognized that the formulation of a new policy is best done through a notice of proposed rulemaking instead of in individual adjudications.^{5/} Unlike an adjudication, a rulemaking permits a wide range of participants to submit to the Commission varied input on the issue without being limited by the circumstances of a particular case.^{6/} Additionally, the Commission has found that the promulgation of a rule can prove more efficient than relying upon ad hoc determinations. Specifically, the Commission has stated that “[o]ur past experience in trying to make such determinations on an ad hoc basis persuades us that the certainty provided by a clear rule is preferable and that the time to define that rule is when [parties] are not embroiled in major litigation.”^{7/} This is especially true here, where, unless the Commission makes its position clear with regard to cable/DBS cross-ownership, significant amounts of time and money will be expended by applicants and the Commission each time a cable operator seeks to gain an ownership interest in a DTH operator.

6. Those commentators that contend that the Commission should address cable/DBS cross-ownership on a case-by-case basis, instead of by promulgating a clear rule, focus on the Commission’s desire to retain a flexible, “streamlined” regulatory structure for the purportedly

^{5/} Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250, 1265 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1974), *reh’g denied*, 423 U.S. 886 (1975).

^{6/} Id.

^{7/} See Accounting for Judgments and Other Costs Associated with Litigation, 12 FCC Rcd 5112 (1997) at ¶ 19.

“dynamic” DTH services.^{8/} There is nothing, however, “streamlined” about forcing applicants and the Commission to treat each application proposing cable/DBS cross-ownership as a case of first impression. With regard to flexibility, the Commission always retains the flexibility to address unique situations through waiver requests. Furthermore, while Univision agrees that the Commission should refrain from promulgating unnecessary rules, where an issue can be anticipated to arise in the future and where, as here, the Commission will have to create policy to address such situations, the public would be better served by having the Commission promulgate a rule through notice and comment proceedings to eliminate uncertainty rather than having the Commission invent policy as it processes applications.

7. The Commission has requested and received extensive comments on the cable/DBS cross-ownership issue. It should now take this opportunity to make its position on this issue known and eliminate uncertainty, rather than to exalt a minimalist regulatory theory that, as a practical matter, makes the application process more complex by forcing applicants and others to guess where the Commission stands on the cable/DBS cross-ownership issue. Regulatory uncertainty should not be confused with flexibility.

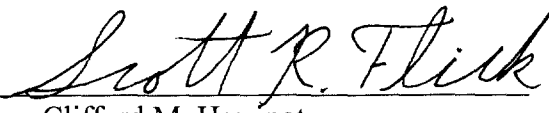
^{8/} See, e.g., Comments of the National Cable Television Association, IB Docket No. 98-21 (filed April 6, 1998) at 3-7; Comments of PRIMESTAR, INC., IB Docket No. 98-21 (filed April 6, 1998) at 6-13.

Conclusion

For all the above reasons, Univision Communications Inc. urges the Commission to adopt regulations, as set forth in Univision's Comments, prohibiting common ownership of MPVDs serving the same geographic area.

Respectfully submitted,

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